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Supreme Court, U.S.
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No.
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IN THE

Supreme Court of the United States

DAWN EDLUND,

Petitioner,

v.

BOB RYAN MOTORS, INC.,
a Minnesota corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Federal Odometer Law, 49 U.S.C. § 32710, *et seq.*, expressly mandates an award of costs and a reasonable attorney's fee to a prevailing plaintiff, and federal courts have a fundamental responsibility to enforce congressional legislation. In this case, the Eighth Circuit nonetheless affirmed without opinion the district court's decision precluding prevailing plaintiff Edlund from applying for a statutorily-mandated recovery of costs and attorney's fees.

The questions presented are:

1. Whether a district court may as a sanction preclude a prevailing plaintiff from applying for costs and attorney's fees when the United States statute under which the case was brought and decided mandates an award of costs and attorney's fees to the prevailing plaintiff.

2. Whether petitioner was deprived of property in violation of the Due Process Clause of the Fifth Amendment.

3. Whether the district court abused its discretion in resorting to sanctioning under its inherent power for three discrete disclosure violations which the district court conceded were immaterial and non-prejudicial.

PARTIES TO THE PROCEEDING

Petitioner Dawn Edlund is a resident of Minnesota and an electrical engineer employed by Medtronic, Inc., in Fridley, Minnesota.

On May 15, 1999, respondent Bob Ryan Motors, Inc., d/b/a Bob Ryan Ford in Minnetonka, Minnesota, sold a two-year-old 1997 Ford Mustang GT convertible to petitioner. Respondent is a non-public Minnesota corporation, the sole shareholder of which is Thomas Ryan. In December 1999, respondent sold the assets of its Ford dealership to Ridgedale Automotive, Inc., which changed the name of the dealership to Morrie's Minnetonka Ford. Petitioner initially sued Ridgedale Automotive and later joined respondent with leave of court, after which petitioner pursued her case only against respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Montgomery, D.J.) precluding petitioner from applying for statutorily-mandated costs and attorney's fees (Appendix ("Pet. App.") 4a-8a) is not otherwise published. The court of appeals' order (per McMillian, Lay, and Riley, JJ.) affirming without opinion[1] (Pet. App. 3a) and its orders denying rehearing and rehearing *en banc* (*id.* 2a) and staying mandate (*id.* 1a) are not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its order affirming without opinion on November 5, 2002, and denied rehearing and rehearing *en banc* on December 12, 2002. Petitioner's motion to stay mandate was granted on December 20, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

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1 Pursuant to 8th Cir. R. 47B, a judgment or order appealed from may be affirmed without opinion if the court in its discretion determines an opinion would have no precedential value ***and*** any of four particular circumstances disposes of the matter submitted to the court for decision. (Emphasis added.) The four circumstances set out in 8th Cir. R. 47B are: (1) a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) the evidence in support of a jury verdict is not insufficient; (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or (4) no error of law appears.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the Federal Odometer Law relevant to this petition is 49 U.S.C. § 32710, which provides:

> (a) *Violation and Amount of Damages.* Any person who, with the intent to defraud, violates any requirement imposed under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.
> (b) *Civil Actions.* A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction. The action must be brought not later than 2 years after the claim accrues. The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.[2]

The provision of the United States Constitution relevant to this petition is the Due Process Clause of the Fifth Amendment, which provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

1. On Saturday, May 15, 1999, petitioner bought

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[2] In 1994, the words "The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person" were substituted for "in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fees as determined by the court" for clarity. Pub. L. 103-272, Sec. 1(e), July 5, 1994, 108 Stat. 1055.

a 1997 Ford Mustang GT convertible from respondent Bob Ryan Motors, Inc., d/b/a Bob Ryan Ford. The odometer mileage was 9,239 at the time of the sale. Petitioner immediately discovered that the odometer logged miles intermittently,[3] and her extensive and extensively documented attempts to resolve the problem over the ensuing six months were stonewalled by respondent's employees and its president and sole shareholder, Thomas Ryan. On June 16, 2000, petitioner commenced a lawsuit under the Federal Odometer Law, 49 U.S.C. §§ 32701, *et seq.*, initially suing only Ridgedale Automotive, Inc., d/b/a Morrie's Minnetonka Ford, and later joining respondent with leave of court after learning that respondent had sold the assets of its Bob Ryan Ford dealership to Ridgedale Automotive in December 1999.

2. Sixteen months later and following a five-day trial that began on Wednesday, October 3, 2001, the jury returned a verdict which found that respondent failed to provide petitioner with an accurate written odometer disclosure statement, that respondent did so with an intent to defraud petitioner, and that petitioner sustained damages of $13,000 as the result of respondent's violation of the Federal Odometer Law. It was shown at trial that the Mustang, which had been on lease for two years prior to petitioner's purchase, actually had travelled 25,000-30,000 miles before petitioner bought it and that respondent knew but failed to disclose that the odometer mileage was inaccurate when it sold the Mustang to petitioner.

3. However, on Friday, September 28, 2001, five days before the trial was to begin (and did begin), the magistrate judge convened a telephonic conference

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3 Immediately after buying the Mustang, petitioner took an 800-mile trip and noticed that the odometer logged only 117 miles.

to determine whether petitioner's substitution of new tires for the four bald tires changed the condition of the Mustang and affected the ability of respondent's experts to inspect the vehicle. He said in pertinent part:

> I'd like both of you to come in and see me [three days hence on Monday, October 1, 2001].
>
> *
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> *
>
> Mr. Stanbury, the order was in March and I'd like you to present some testimony either by affidavit or by you at least presenting as an officer of the court what the condition was of the vehicle in March versus when the inspection took place in September. And I'd also like the defense to tell me, either by affidavit or by testimony, as to the importance of the tires *vis-a-vis* an odometer issue. If in fact, the size of the tires or condition of tires materially affects the odometer reading. I want to know about that and I'm going to give you an opportunity to make a record of that.
>
> *
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> *
>
> I'm also going to tell you that I'm considering imposing sanctions or at least recommending that Judge Montgomery consider sanctions if indeed I think that plaintiff [has] not fairly presented that vehicle for inspection following my order of March, including, but not limited, ordering that any expert testimony being offered by plaintiff be not allowed at the

> trial of this matter, and I'm just going to be up-front with both of you.

Conference Transcript, pp. 3-4 (D. Minn. Docket No. 203).

At a two-hour hearing held on the following Monday, petitioner's expert, Paul Brand, showed that, *inter alia*, the circumference of each of the new tires was only about 1-2% larger than the circumference of each of the bald tires, and thus the replacement of the bald tires had a negligible effect on the number of miles logged by a properly functioning odometer. And petitioner's attorney informed the magistrate judge that, as the result of a collision with a deer about six weeks before, the left front fender of the Mustang had been damaged and repaired. At the conclusion of the hearing, the magistrate judge said in pertinent part:

> It sounds as though the defendant now has before it the repair and the estimates from the August 14 deer-vehicle accident and the tires will be delivered to the defendant shortly. *I'm not entirely convinced, given the record I had today, that there's been all that much prejudice to the defendants by virtue of the late disclosures. So I'm not going to make a report and recommendation to Judge Montgomery that the plaintiff's case be dismissed or that such other draconian sanctions be imposed. It may indeed be the case that some sanctions should be imposed, but I'll leave that up to Judge Montgomery.* I'm happy to at least see that the repair estimates from the August accident are now in place, that the tires will be delivered to [Morrie's Minnetonka Ford] auto body shop by this afternoon, and that this matter will proceed to trial

on Wednesday as scheduled.

Hearing Transcript, pp. 73-74 (D. Minn. Docket No. 204) (emphasis added).

In the late afternoon of the following day and thus sixteen hours before the trial was to begin (and did begin), the magistrate judge issued a Report and Recommendation ("R&R") in which he recommended that petitioner's attorney should be precluded from applying for statutory attorney's fees "for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure." The magistrate judge's recommended sanction, his recitation of bad faith, and his tone contrasted starkly with the substance and tone of what he said at the hearing only 24 hours before, *e.g:*

> Though the original tires were not destroyed and remain available for inspection, plaintiff counsel's failure to timely produce the original tires for inspection along with the car constitutes an intentional effort to withhold evidence which is material to this action and was subject to disclosure pursuant to court order and the obligation to supplement responses to defendants' discovery under Fed. R. Civ. P. 26(e). Plaintiff is not faulted for replacing worn tires, but counsel's failure to promptly disclose such a material alteration and produce the original equipment for inspection is inexcusable.
>
> *
> *
> *
>
> It does not appear that the deer accident

has any direct and critical implications with respect to the ability of defendants' experts to inspect the vehicle in regards to brake pad wear and tire tread wear. However, plaintiff was served discovery requests requiring disclosure of accidents and incidents of this nature and is required to supplement discovery responses as appropriate. Plaintiff counsel's failure to timely disclose the collision with a deer and the subsequent repairs to the Mustang was a knowing and intentional effort to evade disclosure obligations.

*
*
*

Plaintiff counsel's failure to advise defendants that the tires on the 1997 Mustang had been replaced, failure to produce the original tires for inspection along with the vehicle, and failure to disclose the August 2001, collision with a deer, constitute intentional efforts to avoid required disclosure. Counsel's argument to the effect that defendants should have deduced the need for tire replacement is unavailing and is essentially irrelevant to the discovery issue. Likewise, with respect to the deer accident, materiality of the incident is separate from the disclosure obligation. Plaintiff counsel's conduct in this matter warrants significant sanctions which may be imposed by the Court in the exercise of its inherent power to control litigation. *West v. Goodyear*

> *Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999). Under the circumstances now presented to the Court, the sanction of dismissal of all claims would be unduly harsh where it has not been shown that certain discovery violations are materially adverse to the defense or will decisively prejudice defendant's case. *Id.* at 779.
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> *
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>
> The Court therefore concludes that the appropriate sanction in this matter is plaintiff counsel's forfeiture of any statutory attorney fees which might have been claimed or assessed in the event plaintiff prevails in this action.

Pet. App. 11a-13a; full text at Pet. App. 9a-13a.

Three days after the jury returned its verdict, petitioner filed a timely objection to the R&R and requested a hearing pursuant to Fed. R. Civ. P. 72(a) and D. Minn. Loc. R. 72.1(c)(2). Pet. App. 14a-41a. On December 7, 2001, two months after the jury returned its verdict, the trial judge issued a Memorandum Opinion and Order in which she trebled the jury's damage award as required by 49 U.S.C. § 32710(a), ordered entry of judgment in the amount of $39,000, and summarily denied petitioner's objection to the R&R, saying only:

> Plaintiff objects to the October 2, 2001, R&R of Judge Boylan. The R&R recommends that 'as a sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of' Civil Procedure, Plaintiff's counsel be precluded from asserting any

> claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute.' R&R at 4. Judge Boylan's R&R is well reasoned and appropriate, and it is accepted in full. Plaintiff's Objection is denied.

Pet. App. 6a; full text at Pet. App. 4a-8a.

Then, *sua sponte*, the trial judge ruled that "[B]ecause Plaintiff's counsel has been precluded from asserting any claim for attorney fees, [plaintiff's] Application for Costs and Litigation Expenses is moot." *Id.*

4. Petitioner filed a notice of appeal on December 10, 2001, and respondent's insurer, Legion Insurance, satisfied the $39,000 judgment five weeks later. Respondent did not cross-appeal, and briefing was completed on April 1, 2002. Oral argument was scheduled to be heard on August 20, 2002, but, on July 26, 2002, respondent moved to stay appellate proceedings and postpone oral argument on the grounds that the Pennsylvania state court which was overseeing the rehabilitation of Legion Insurance had issued an order staying all proceedings involving Legion's insureds until September 27, 2002. Legion, it was learned at that time, had been placed in receivership on March 28, 2002. Petitioner objected, but the Eighth Circuit summarily granted respondent's motion and removed the case from the oral argument calendar and rescheduled it to be heard on October 9, 2002. On September 27, 2002, respondent again moved to stay appellate proceedings and postpone oral argument on the grounds that the Pennsylvania court had extended its stay of all proceedings involving Legion's insureds by 60 days pending a hearing of objections to an order to liquidate Legion. Petitioner again objected, and the Eighth Circuit, on October 7,

2002, summarily denied respondent's motion but at the same time removed the case from the oral argument calendar and declared that the case would be decided on the briefs and the record. The record was docketed on October 29, 2002, and, a week later on November 5, 2002, the Eighth Circuit panel issued an unpublished order affirming the district court's order without opinion. Pet. App. 3a. The record was returned to the district court on November 26, 2002. Petitioner's timely filed petition for rehearing *en banc* was denied on December 12, 2002. Pet. App. 2a.

5. On December 20, 2002, the Eighth Circuit granted a stay of its mandate through January 23, 2003. The stay was granted without opinion, but, although not controlling, it is said in the Eighth Circuit's *Internal Operating Procedures* at 22 that "A party may move to stay the issuance of a mandate . . . , but the court usually denies a stay unless the panel concludes there is a reasonable chance certiorari will be granted.

6. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court And Other Circuits Holding That A Federal Court May Not Disregard Its Responsibility To Enforce Congressional Legislation By Exercising Its Inherent Power In A Way Which Conflicts With Constitutional And Statutory Provisions.

The district court's unsupportable imposition of sanctions in the form of an ordered forfeiture of statutorily-mandated costs and attorney's fees is in flagrant conflict with Supreme Court precedents and constitutional[4] and statutory provisions. Citing this Court's holding in *Bank of Nova Scotia*, 487 U.S. 250, 254

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4 *See* Reason II *infra*.

(1988), the Seventh Circuit has held that *"[C]ourts may not exercise their inherent powers in a way that actually conflicts with constitutional or statutory provisions."* *Kovilic Construction Co., Inc. v. Missbrenner,* 106 F.3d 768, 772 (7th Cir. 1997) (emphasis added). In *Bank of Nova Scotia,* this Court held that a federal court may not invoke its inherent power to circumvent the harmless-error inquiry prescribed by Fed. R. Crim. P. 52, and observed in pertinent part:

> It follows that Rule 52 is, in every pertinent respect, as binding as any statute enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate *than they do to disregard constitutional or statutory provisions.* The balance struck by the Rule between societal costs and the rights of the accused may not be overlooked 'because a court has elected to analyze the question under the supervisory power.' *United States v. Paynor, supra, at 736.*

487 U.S. at 255 (emphasis added).

In *United States v. Paynor,* 447 U.S. 727 (1980), wherein this Court ruled that the district court erred when it invoked its inherent power to suppress evidence even though an illegal search did not violate the accused's Fourth Amendment rights, this Court held in pertinent part:

> The District Court erred, therefore, when it concluded that 'society's interest in deterring [bad faith] conduct by exclusion outweigh[s] society's interest in furnishing the trier of fact with all relevant evidence.' 434 F.Supp. at 135. This reasoning, which the Court of Appeals affirmed, amounts to a

> substitution of individual judgment for the controlling decisions of this Court. *Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.* We hold that the supervisory power does not extend so far.

Id. at 737 (emphasis added).

In *Thomas v. Arn*, 474 U.S. 140 (1980), wherein this Court affirmed the denial of the petitioner's right to appeal for failing to file objections to the magistrate judge's report as required by the Sixth Circuit's facially-sensible rule requiring objections to be filed within 10 days, this Court observed in pertinent part:

> *Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions.* A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. *United States v. Payner*, 447 U.S. 727, 737 (1980). Thus, we now consider whether the Sixth Circuit's waiver rule conflicts with statutory law or with the Constitution.

Id. at 148 (emphasis added).

And in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), wherein this Court rejected the D. C. Circuit's reliance on inherent power to uphold a dismissal of a complaint for failure to comply with a production order, this Court held in pertinent part: *"[T]here are constitutional limitations upon the power of courts,* even in the aid of their own valid purposes, to dismiss an action

without affording a party the opportunity for a hearing on the merits of his cause." *Id.* at 209 (emphasis added), *citing, Hovey v. Elliot,* 167 U.S. 409 (1897) and *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909).

The Ninth Circuit recognized that fundamental principle in *Freestone v. Cowan,* 68 F.3d 1141, 1150 (9th Cir. 1995):

> The availability of a § 1983 action to enforce statutory rights is well settled. Given *our responsibility to enforce congressional legislation* and to respect binding Supreme Court precedent, there can be *no* legitimate question as to the conclusion we must reach in this case. We join the First and Eighth[5] Circuits in holding that § 1983 is available and reverse. (Emphasis added.)

The general rule (*i.e.,* the "American Rule") is that, absent statute or enforceable contract, litigants pay their own attorney's fees. *F. D. Rich Co., Inc. v. United States,* 417 U.S. 116, 128-131 (1974). However, while fully recognizing and accepting the general rule, Congress has made specific and explicit provisions for the allowance of attorney's fees under selected statutes granting or protecting various federal rights. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 260 (1975). These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. *Id.* at 260-261. For example, under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), the prevailing party is entitled to attorney's fees at the discretion of the court, but this Court has held that Congress intended that the award "shall" be made to the successful plaintiff absent exceptional circumstances. *Id., citing, Newman v. Piggie*

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5 *Howe v. Ellenbecker,* 8 F.3d 1258 (8th Cir. 1993).

Park Enterprises, Inc., 390 U.S. 400, 402 (1968). In patent litigation, meanwhile, a court "may" allow attorney's fees in exceptional cases, 35 U.S.C. § 285, while allowance of attorney's fees to a plaintiff is mandatory under the antitrust laws if damages are trebled, 15 U.S.C. § 15. *Id.* at 261. This Court has observed that "under the scheme of things, it is apparent that the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making these awards *are matters for Congress to decide.*" *Id.* (emphasis added).

An award of attorney's fees and costs to a prevailing plaintiff is mandatory in a Federal Odometer Law action ("The court *shall* award costs and a reasonable attorney's fee to the person when a judgment is entered for that person."). 49 U.S.C. § 32710(b) (emphasis added). In *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 726-27 (8th Cir. 1978), the Eighth Circuit explained the reason Congress provided for a mandatory attorney's fee in odometer cases:

> By its enactment of Title IV of the Motor Vehicle Information and Cost Savings Act, Congress sought to 'establish a national policy against odometer tampering and prevent consumers from being victimized by such abuses.' S. REP. No. 92-413, 92d Cong., 2d Sess., 3 U.S. CODE CONG. & ADM. NEWS 3690, 3962 (1972). This policy is carried over in 15 U.S.C. § 1981, which states: 'it is therefore the purpose of this subchapter to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers . . . .' To accomplish its *remedial purposes* the Act provides in 15 U.S.C. § 1989 for the

> recovery of treble damages or $1500, whichever is greater. The same section makes recovery of reasonable attorney's fees a *mandatory feature of a defendant's liability* upon proof of a violation. See 15 U.S.C. § 1989(a), quoted in note 4 supra. We agree with the district court's observation that these provisions are a response to legislative recognition that, as a practical matter, 'in many situations, the amount of damages under the Act will be so small that few attorneys will pursue his client's case with diligence unless the amount of the fee be proportionate to the actual work required, rather than the amount involved.' In rejecting defendant's argument, we do not minimize the significance of the amount of recovery as a factor in determining the reasonable value of an attorney's services. That factor, however, must be placed alongside the others, and all must be placed in the context of a concrete case. We hold that where as here, a *remedial* statute *requires* the awarding of attorney fees *as an element of recovery*, a showing that the trial court's award exceeds the amount of damages does not, standing alone, amount to an abuse of discretion. (Emphasis added.)

In *People of Sioux County, Nebraska v. National Surety Company*, 276 U.S. 238, 243 (1928), a diversity action that had been removed from state court, this Court reversed the Eighth Circuit's disallowance of an award of attorney's fees which was mandated by a Nebraska statute, holding in pertinent part:

> [I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made the policy effective by making the allowance of the fee *mandatory* on its courts in those cases. It would be anomalous if this policy could be thwarted and the right so plainly given destroyed by removal to the federal courts. (Emphasis added.)

In further disregard for its responsibility to enforce the mandates of a United States statute, the district court precluded petitioner from applying for costs and litigation expenses because (and only because) her attorney had been precluded from asserting any claim for statutory attorney's fees. Pet. App. 7a ("[B]ecause Plaintiff's counsel has been precluded from asserting any claim for attorney fees, the Application for Costs and Litigation Expenses is moot."). That is beyond illogical. In reality it imposed a sanction of what now amounts to more than $11,000 without even calling it a sanction, while precluding her attorney from applying for statutory attorney's fees in reality imposed a monetary sanction on her by requiring her to pay an amount of attorney's fees required by her contract with her attorney. Not surprisingly, however, the fee received by petitioner's attorney is not even remotely proportional to the time and effort he expended and continues to expend on petitioner's righteous case.

The discretion as to the allowance of costs which the district court ordinarily would have had under Fed. R. Civ. P. 54(d) was taken away by 49 U.S.C. § 32710(b). Rule 54(d) is clear: The general discretion of the trial court with regard to costs is subordinated "when express provision therefor is made either in a statute of the United States or in these rules." The general federal statutes on fees and costs are in 28 U.S.C. §§ 1911-1929,

but, additionally, Congress frequently provides for the award of costs when it creates specific statutory rights. That is what Congress provided within the Federal Odometer Law at 49 U.S.C. § 32710(b) ("The court shall award costs and a reasonable attorney's fee to the person when a judgment is entered for that person.").

In *Assoc. of W. Railways v. Riss & Co.*, 320 F.2d 785 (D.C. Cir. 1963), the federal district court refused to allow costs to the prevailing parties, and that exercise of discretion was challenged on appeal. The appellants argued that the D. C. Code mandating costs to the prevailing party was a statute of the United States and thus took from the trial judges in that jurisdiction the discretion as to the allowance of costs which they otherwise had under Rule 54(d). *Id.* at 786. The D. C. Circuit agreed with the appellants' reasoning but affirmed the disallowance of costs upon finding that the D. C. Code was not a statute of the United States, observing in pertinent part:

> It follows that, *if* § 1517 of the District Code is actually a Congressional enactment in force in the District of Columbia, it is a 'statute of the United States' which, contrary to the generality of Rule 54(d), does not give a trial judge discretion, but *requires* the allowance of costs to the prevailing party.

Id. (emphasis added).

It would be anomalous indeed if the mandates of 49 U.S.C. § 32710(b) or any other statute granting or protecting federal rights could be thwarted and the right so plainly given destroyed by the judicial *fiat* of the sort witnessed in the instant case and inexplicably countenanced by the Eighth Circuit. The remedial purposes of the Federal Odometer Law would be eviscerated if practitioners who otherwise would be

inclined to take on such cases were to learn that a client's entitlement to statutorily-mandated attorney's fees and costs might be forfeited at any stage of the litigation upon the slightest discovery or disclosure violation, even if, as conceded by the district court in the instant case, the ostensible violation was immaterial and non-prejudicial. Vindication of federal rights would be discouraged. If practitioners and aggrieved parties alike cannot trust the courts to enforce and abide by the laws as written, we are all lost. This case accordingly merits the Court's immediate review.

II. Certiorari Is Warranted Because The Decision Below Deprived Petitioner Of Property In Violation Of Her Fifth Amendment Right To Procedural Due Process.

The Due Process Clause of the Fifth Amendment asserts that no person shall "be deprived of life, liberty, or property without due process of law." The Constitution does not create property interests but instead extends various procedural safeguards to certain interests "that stem from an independent source such as a [federal] law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). When presented with a due process challenge, a court must determine, first, whether there has been a deprivation of a property interest, and, if so, what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Upon prevailing at trial, petitioner succeeded to a protected, cognizable property interest in the form of a clear entitlement to an award of attorney's fees and costs. A claim of entitlement under [federal] law, to be enforceable, must be derived from statute or legal rule or through a mutual understanding. *Perry v. Sinderman*, 408 U.S. 493, 601-602 (1972). Petitioner's entitlement was "clear" because it was mandated by 49

U.S.C. § 32710(b) in the event she prevailed at trial. Accordingly, because petitioner possessed cognizable property interests within the terms of the Fifth Amendment, the Constitution obligated the district court to afford her procedural due process before depriving her of her property interests in costs and attorney's fees. That was not done.

Inherent power sanctions may not be imposed unless the procedure leading to the assessment comports with due process. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 and n. 14 (1980). If due process rights are violated, any sanctions award will be reversed. *Glass v. Pfeffer*, 657 F.2d 252, 257-58 (10th Cir. 1981). Due process is a flexible concept, and the particular procedural protections vary depending on the circumstances. *See Chambers v. NASCO, Inc.*, 501 U.S, 32, 50 (1991) ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees."). Neither petitioner nor her attorney were afforded adequate notice and an opportunity to be heard before the sanctions were entered. Due process requires, in the absence of extraordinary circumstances, notice and an opportunity to be heard before sanctions are imposed. *Eash v. Riggins Trucking, Inc.*, 767 F.2d 557, 570 (3d Cir. 1985). This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Notice for due process purposes entails awareness of (1) the fact that sanctions are under consideration, (2) the reasons why they are under consideration, *and* (3) the type of sanctions being considered. *In re Tutu Wells Contamination Litig.*, 120 F.3d.368 (3d Cir. 1997) (emphasis added).

The district court precluded petitioner from

applying for statutory costs without providing notice and an opportunity to be heard. That sanction was not recommended in the R&R, and petitioner did not receive any other warning that the imposition of such a sanction was being considered. Petitioner did not learn of its imposition until the issuance of the Memorandum Opinion and Order which precluded petitioner from applying for statutory costs because and only because her attorney had been precluded from applying for statutory attorney's fees. Whatever procedure may be fashioned, the failure to provide the offender with an opportunity to be heard will require reversal. *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1211 (11th Cir. 1985).

Although the issuance of the R&R was preceded by a hearing, neither petitioner nor her attorney were afforded adequate notice and an adequate opportunity to be heard before the R&R was issued and then "adopted in full." The hearing was convened *solely* to determine whether the substitution of new tires for the four bald tires changed the condition of the Mustang and affected the ability of respondent's experts to inspect the vehicle. The hearing was not convened pursuant to any kind of motion. Petitioner and her attorney were notified that sanctions were being considered and why, but the only type of sanction which was said to be under consideration was evidence exclusion, specifically the exclusion of petitioner's expert report. Petitioner responded accordingly by calling her expert to testify, and, consonant with the magistrate judge's wish to be told of any other changes in the condition in the condition of the Mustang between March 2001 and respondent's inspection in September 2001, petitioner's attorney obligingly informed the magistrate judge of the Mustang's collision with a deer and subsequent repairs.

Where no inquiry was made or testimony adduced

as to the subjective intent of petitioner's attorney in not disclosing the tire replacement and the collision with a deer, the magistrate judge's recitation of bad faith was talismanic. *See generally* G. P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (3d ed. 2000 & Supp. 2002) § 27. And the magistrate judge did not wish to hear any argument concerning the alleged failure of petitioner to comply with the inspection order of March 14, 2001. *E.g.*, when petitioner's attorney tried to respond to that allegation, the following exchange took place at the hearing:

> STANBURY: If somebody were here today, Your Honor, we could do the transfer [of the bald tires]. My client has the tires in the car right now. But the point is they have not been prejudiced. And I know I've belabored the point but there's been the constant accusation that we have refused an inspection and that is just not correct. We have made the car available for inspection since the date we appealed the inspection on the driving issue, and they were unwilling to split the inspection between the driving and viewing. And that's been true since March 23 they could have done this, but they wanted an all or none approach.[6]

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6 Petitioner replaced the bald tires on July 10, 2001, and preserved them in plastic bags in her garage thereafter. Respondent had petitioner's permission to visually inspect, measure, and photograph the Mustang and its bald tires at any time after (actually) March 14 2001. Respondent, however, stubbornly refused to do that unless the Mustang could be driven as part of the inspection, an issue that was on appeal to Judge Montgomery from March 23, 2001, to May 29, 2001, and thereafter was the subject of a Rule 26(c) motion for an indemnifying protective order. Consequently,

> COURT: Well, I'm not going to get back into the question of whether or not the inspection was done timely as to my order or not. I'm not going to do that. Let me get to the question of these tires.

Hearing Transcript, pp. 68-69 (D. Minn. Docket No. 204).

Neither petitioner nor her attorney were called upon or afforded an opportunity to justify the failure to disclose the tire replacement and the collision with a deer nor the opportunity to show that any particular court order was not disobeyed. Moreover, prior to and at the hearing on October 1, 2001, neither petitioner nor her attorney were told that a forfeiture of statutory attorney's fees was being considered, and indeed the magistrate judge told them at the conclusion of the hearing that draconian sanctions were not warranted and that he was going to leave it to Judge Montgomery to decide if any sanctions would be imposed. The ordered forfeiture of statutory attorney's fees was draconian by any measure.

Petitioner and her attorney appear to have been denied procedural due process in another way. By all appearances, the R&R was written at the direction of or in collaboration with Judge Montgomery. That is discouraging to contemplate, but the starkly suspicious contrast between what the magistrate judge said at the hearing on October 1, 2002, and what he wrote in the

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there was no failure to comply with the inspection order of March 14, 2001, because compliance was tolled while the order was on appeal and then while the motion for a protective order was pending. *See* Fed. R. Civ. P. 37(d) ("The failure to act described in this subdivision may not be excused on the ground that the discovery is objectionable ***unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).***") (emphasis added).

R&R just does not compute nor invite any other conclusion. If true, a mockery was made of the procedural opportunities supposedly afforded by Fed. R. Civ. P. 72(a) and 8th Cir. Loc. R. 72.1(c)(2) to a party aggrieved by a magistrate judge's recommendation, and the trial judge's cursory conclusion that the magistrate judge's R&R was "well-reasoned and appropriate" was a self-congratulatory charade and not the product of a required *de novo* review. *See* Advisory Committee Notes to Rule 72(a) ("Implementing the statutory requirements, the rule *requires* the district judge to whom the case is assigned to make a *de novo* determinations of those portions of the report, findings, or recommendations to which timely objection is made.") (emphasis added). Petitioner's Objection was timely and specified the objectionable portions of the R&R with precision.[7] Pet. App. 14a-40a. This case accordingly merits this Court's immediate review.

III. Certiorari Is Warranted Because The District Court's Resort To Sanctioning Under Its Inherent Power Was An Abuse Of Discretion.

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[7] In petitioner's Objection to the R&R (*see generally* Pet. App. 14a-40a), it was shown beyond peradventure that: (i) Petitioner's attorney had no obligation to disclose the immaterial collision with a deer because the collision and the damage sustained had no relevance to whether respondent violated the Federal Odometer Law some ***twenty-seven months*** before nor any relevance to the true resale value of the Mustang ***at the time of sale*** (Pet App. 21a-27a); (ii) he had no obligation to supplement a discovery response that he never made nor was ever required to make (Pet. App. 23a-24a and 36a-37a); (iii) he had no obligation to disclose the immaterial and irrelevant replacement of the unsafe and illegal bald tires, but the replacement ***was*** made known (Pet. App. 24a-26a); and, (iv) ***at no time*** during the litigation did petitioner's attorney fail to comply with any court order (Pet App. 18a-21a)

The district court's resort to sanctioning under its inherent power was an abuse of discretion, and that would be true even if lawful sanctions had been imposed in a lawful way (*i.e.*, the district court's decision to sanction under its inherent power rather than under the Rules was an abuse of discretion in and of itself). Petitioner has never disputed the well-settled existence of an inherent power to impose sanctions and control litigation, but, as shown in Reason I *supra*, that inherent power is not unbounded and does not encompass a right to ignore an unambiguous mandate of a statute of the United States and, in particular, a mandatory award of attorney fees and costs in a statute granting or protecting various federal rights. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S, at 52 ("The *limitation* on a court's inherent power described [in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 n. 31 (1975)] applies only to fee-shifting rules that embody a substantive policy, *such as a statute which permits a prevailing party in certain classes of litigation to recover fees.*") (emphasis added).

In *Chambers.*, 501 U.S, 32 (1991), wherein this Court in a 5-4 decision found no abuse of discretion in the district court's resort to its inherent power under the circumstances, this Court held in pertinent part as follows with regard to the "assessment"[8] of attorney's fees as a sanction for bad-faith conduct:

[W]hen there is bad faith conduct in the

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8 The district court in the instant case did not assess attorney's fees *per se, i.e.*, neither petitioner nor her attorney was ordered to pay a specific amount of money to respondent or its ***three*** attorneys. If that had been done, meaningful review would not have been foreclosed as it has been under the circumstances. To be sure, however, petitioner's attorney and petitioner herself were penalized monetarily and excessively by the district court.

> *course of litigation that could be adequately sanctioned under the Rules rather than the inherent power, the court ordinarily should rely on the Rules rather than the inherent power.* But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Id. at 48-49 (emphasis added).

In *Chambers,* Justice Kennedy wrote in pertinent part as follows in dissent:

> By allowing exclusive resort to inherent authority whenever conduct sanctionable under the Rules is intertwined within conduct that only the inherent power could address, *ante,* at 51, the Court encourages all courts in the federal system to find bad-faith misconduct in order to eliminate the need to rely on specific textual provisions. . . . Finally, as Part IV of the Court's opinion demonstrates, *the lack of any legal requirement other than the talismanic recitation of the phrase 'bad faith' will foreclose meaningful review of sanctions based on inherent authority. See Cooter & Gell v. Hartmarx Corp., supra,* at 402.

Id., at 61 (emphasis added).

The magistrate judge's reliance on *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999) was misplaced. After asserting that petitioner's attorney had withheld evidence which was subject to disclosure "pursuant to court order," the magistrate judge cited *West* as support for the court's authority to impose significant sanctions in the exercise of its inherent power to control litigation. Pet. 12a. *West* is an inapposite spoliation[9] case which stands for the

proposition that "a district court may impose sanctions under Rule 37(b) when a party spoliates evidence *in violation of a court order*" and, "[e]ven without a discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation." *Id.* at 779, *citing, Chambers,* 501 U.S. at 43-45 (emphasis added). No evidence was destroyed or significantly altered in the instant case, the bald tires were preserved after removal from the Mustang,[10] and the trial judge rejected respondent's proposed jury instruction on spoliation and underscored the immateriality of the collision with a deer by excluding any reference to it during trial. In short, nothing was spoliated, and the sanctions were *not* imposed for spoliation. The resort to sanctioning a mere three discrete, non-prejudicial disclosure transgressions under the court's inherent power rather than under the Rules was unsupported, unsupportable, and inexcusable.

In *Chambers,* much of the defendant's wide-ranging misconduct was seen to have been beyond the Rules because it was both sanctionable under the Rules and intertwined within conduct that only the inherent power could address. *Id.* at 49. That was not in the least bit true in the instant case where the perceived disclosure violations not intertwined with anything, and it cannot be and never was contended that the sanctioning provisions of Rule 37(c)(1)[11] and 37(b)(2) were not "up to the task."

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9 Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *See* BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

10 *See* n. 6 *supra.*

11 Rule 37(c)(1) provides for the imposition of sanctions for Rule 26(e) disclosure violations.

The Seventh Circuit declined to countenance a remarkably similar abuse of discretion by the district court in *Kovilic Construction Co., Inc. v. Missbrenner*, 106 F.3d 768 (7th Cir. 1997). On appeal from the bankruptcy court, the district court had reversed the bankruptcy court's decision on the merits and ordered entry of judgment of $49,476.17 in the creditor's favor because the debtor's attorney had never filed an appearance form (for which he could have been penalized $50 if it were filed late) nor an affidavit of ethical conduct (for which he could have been barred from participating in the proceedings pending compliance). On further appeal, the 7th Circuit reversed, holding in pertinent part:

> It is plain from this that neither Local Rule 3.4 nor Local Rule 39[12] authorized the draconian sanction of summary reversal of the client's case on the merits.
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>
> This takes us to the legal authority urged most strongly by Kovilic: the inherent power of the district court. The Supreme Court ruled in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), that a district court has the inherent power to 'fashion [ ] appropriate sanction[s] for conduct which abuses the judicial process.' *Id.* at 44. This power exists even where procedural rules govern the same conduct. Id. at 49. Nevertheless, '[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.' *Id.* at 44. Furthermore, courts may not

12 Northern District of Illinois Local Rules 3.14 and 39.

exercise their inherent powers in a way that actually conflicts with constitutional or statutory provisions. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). The 'supersession' clause of the Rules Enabling Act, 28 U.S.C. sec. 2072(b), which states that laws in conflict with national rules of procedure shall be of no further force or effect, suggests that exercises of inherent powers may also not directly conflict with the national procedural rules. *See also* Fed. R. Civ.P. 83(b). This court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest (even in the absence of a direct conflict) the restrictions in those rules become meaningless. *See, e.g., G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (noting that although the district court has 'substantial inherent power,' this power must be exercised in harmony with the Federal Rules of Civil Procedure; *Strandell v. Jackson County, Ill.*, 838 F.2d 884, 886-87 (7th Cir. 1987) (same). Sanctions authorized only by the inherent power of the court are therefore available only when no direct conflict with laws or national rules of procedure would arise.

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'The provisions of Rule 37 which are here involved must be read in light of the

> provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . .' *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958).
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> Here, there is no doubt that Weissberg was negligent when he violated Local Rules 3.14 and 39.
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> On the other hand, there is no evidence that Weissberg's actions were fraudulent, dilatory, or taken in bad faith.
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>
> The judgment of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.

Id. at 772-74.

In *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000), *cert. denied*, 531 U.S. 825 (2000), a diversity action involving an odometer rollback, the Eighth Circuit Court of Appeals reversed the district court's denial of statutory attorney's fees, concluding that the trial court abused its discretion when it denied Ms. Grabinski's attorney's fees simply because it felt that the punitive damages award was "generous" and because it did not want to "'pad' the damages award with a fee award in this case." *Id.* at 1028. That is the sort of thinking that was at work

below in the instant case, where, along with her undue disparagement and trivialization of petitioner's case and the federal policy underlying it, the trial judge expressed the patronizing belief that Edlund should be more than happy with the amount of relief she has already obtained ("After the statutory trebling, the damage judgment of $39,000 is a handsome compensation for an odometer discrepancy on a $25,000 car that Plaintiff retains."). Pet. App. 8a. In *Grabinski*, the Eighth Circuit observed that "[d]enying fees because Ms. Grabinski received 'generous' punitive damages stands the matter entirely on its head because it punishes her for her success, the very thing that is supposed to be rewarded." 203 F.3d at 1028. The case was remanded with directions to award Ms. Grabinski a fully compensatory fee consistent with *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983), and Ms. Grabinski was awarded the costs of her appeal and the attorney's fees occasioned on account of the appeal. *Id.* This case accordingly merits this Court's immediate review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED STANBURY
Counsel of Record
STANBURY LAW FIRM P.A.
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(612) 789-5060
Attorney for Petitioner

APPENDIX A: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED DECEMBER 20, 2002

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3965MNMI

Dawn Edlund,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court for
Ridgedale Automotive,	*	The District of
Inc., etc., et al.,	*	Minnesota
	*	
Appellees.	*	

Appellant's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including January 23, 2003. If within that time there is filed with the Clerk of this court a certification of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

December 20, 2002

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED DECEMBER 12, 2002

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3965MNMI

Dawn Edlund,	*	
	*	
Appellant,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Ridgedale Automotive,	*	for Rehearing
Inc., etc., et al.,	*	En Banc
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 12, 2002

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED NOVEMBER 5, 2002

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3965

Dawn Edlund,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the District of
Ridgedale Automotive, Inc.,	*	Minnesota
a Minnesota corporation	*	
d/b/a Morrie's Minnetonka	*	
Ford f/k/a Bob Ryan Motors,	*	[UNPUBLISHED]
Inc.; Bob Ryan Motors, Inc.,	*	
a Minnesota corporation,	*	
	*	
Defendants-Appellees.	*	

Submitted: October 9, 2002
Filed: November 5, 2002

Before MCMILLIAN, LAY, and RILEY, Circuit Judges.

PER CURIAM. AFFIRMED. See 8th Cir. R. 47B.

APPENDIX D: MEMORANDUM OPINION AND ORDER OF UNITED STATES DISTRICT COURT DATED DECEMBER 7, 2001

***

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. 01-3965

Dawn Edlund,

Plaintiff,

v.

Ridgedale Automotive, Inc., a Minnesota corporation d/b/a Morrie's Minnetonka Ford and f/k/a Bob Ryan Motors, Inc.; Bob Ryan Motors, Inc., a Minnesota corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

Civil No. 00-1478 ADM/AJB

Alfred M. Stanbury, Esq., Stanbuy Law Firm, PA, Minneapolis, MN, on behalf of Plainliff.
Julianne E. Ortman, Esq., Ortman & Associates, Minnetonka, MN, on behalf of Defendants.

I. INTRODUCTION, BACKGROUND AND DISCUSSION

This case is a saga drawn out to a degree rarely contemplated even in a litigious era. On the basis of a dispute about a single car, a used 1997 Ford Mustang GT convertible with a purchase price of $25,117.12, purchased from a single dealership on May 15, 1999, bearing a single faulty odometer reading 9,239 miles at the time of sale, this Court has witnessed a costly and time consuming display miring this litigation with motions upon motions, and contentious, tedious arguments throughout. The often frivolous and unnecessary filings have, at great judicial time and expense, generated a case file currently over-filling six folders and two accordion folders, with nearly 200 docketed documents. The landscape of this litigation has further been marked with delay tactics, gamesmanship, and uncooperative behavior that has resulted in imposition of sanctions against Plaintiff's counsel. All over one faulty odometer on a used car that was off by a few hundred miles . . . it is cases like this which spawn the admonition, "don't make a federal case out of it."

Before the Court are multiple post-trial motions from both parties. The facts of this case are well known to the parties and need not be reiterated here. Plaintiff Dawn Edlund submits a Motion for Order for Entry of Judgment [Doc.No. 183]. Plaintiff has also filed an Objection [Doc. No. 176] to the Report and Recommendation ("R&R") [Doc. No. 150] filed on October 2, 2001. by Magistrate Judge Arthur J. Boylan. Plaintiff also submits an Application for Costs and Litigation Expenses [Doc. No. 188]. Defendant Bob Ryan Motors, Inc., submits a Motion for Hearing on Post Trial Issues [Doc. No. 191]. Defendant argues that (1) there

were errors at trial warranting a new trial or judgment notwithstanding the verdict, (2) damages awarded by the jury were not supported by the evidence, (3) the jury was encouraged contrary to law to find intent to defraud based upon Defendant's negligence, and (4) Plaintiff's request for costs of $9,303.40 is premature and excessive.

First, after a trial by jury from October 3, 2001, through October 9, 2001, the jury retuned a verdict on October 9, 2001, finding Defendant in violation of the Federal Odometer Law, 49 U.S.C. §§ 37201, et seq., and awarding damages of $13,000. As an operation of law. 49 U.S.C. § 37210 requires that the jury damage award be automatically trebled. Judgment is hereby entered against Bob Ryan Motors. Inc., in the amount of $39,000.

Second, Plaintiff objects to the October 2, 2001, R&R of Judge Boylan. The R&R recommends that "as a sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of' Civil Procedure, Plaintiff's counsel be precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute." R&R at 4. Judge Boylan's R&R is well-reasoned and appropriate, and it is accepted in full. Plaintiff's Objection is denied.

Third, because Plaintiff's counsel has been precluded from asserting any claim for attorney fees, the Application for Costs and Litigation Expenses is moot.

Finally, Defendant's Motion for Hearing is denied. The issues raised by Defendant seeking a judgment notwithstanding the verdict or new trial have been carefully considered and dealt with in the course of trial and need not be re-addressed.

Likewise, Defendant's argument about the propriety of the jury instruction on intent to defraud was resolved during trial. The jury instruction was appropriately given.[1]

Defendant's argument that damages awarded were not supported by the evidence is unavailing. Plaintiff asked for $6,366 damages in closing argument. However, the jury instruction on damages allowed them to award "the difference between the fair market value of the vehicle in question with its actual mileage and the amount paid for the vehicle by Plaintiff; and such sum as you find will fairly and justly compensate Plaintiff for any of the damages sustained as the result of the conduct of Defendant." The jury award of $13,000 was more than double what Plaintiff's counsel had illustrated on the blackboard were Plaintiffs damages, but was an amount within the discretion of the jury to award. After the statutory trebling, the damage judgment of $39,000 is a handsome compensation for a an odometer discrepancy on a $25,000 car that Plaintiff retains.

Defendant's objection to the premature and

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[1] The jury instruction read as follows: "To act with the intent to defraud means to act with intent to deceive or cheat for the purpose of bringing some financial gain to one's self or another. Reckless disregard for the truth in determining or disclosing actual mileage may constitute intent to defraud." While it was argued that Defendant had knowledge of an odometer problem that should have been fixed, no evidence was presented in trial to indicate that Defendant was trying to cheat Plaintiff in order to increase its own profit. However, evidence was introduced suggesting that an employee of Defendant did know about a slight odometer mis-reading prior to the purchase of the car by the dealership from its prior owner, and that a record of the broken odometer was contained in Defendant's computer files. This evidence was sufficient for the jury's finding.

excessive nature of Plaintiff's request for costs of $9,303.40 is moot.

II. Conclusion

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

I. Plaintiff's Motion for Order for Entry of Judgment [Doc. No. 183] is GRANTED, and judgment is entered against Defendant for $39,000.00;

2. Plaintiff's Objection to the R&R [Doc. No. 176] filed on October 2, 2001, by Magistrate Judge Boylan is DENIED;

3. The R&R [Doc. No. 150] is ACCEPTED. As a sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure, Plaintiff's counsel is precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute;

4. Plaintiff's Application for Costs and Litigation Expenses [Doc. No. 188] is DENIED AS MOOT; and

5. Defendant's Motion for Heanng on Post Trial Issues [Doc. No. 191] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/Ann D. Montgomery

ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

Date: December 7, 2001

APPENDIX E: REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE DATED OCTOBER 2, 2001

***

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 01-3965

Dawn Edlund,

Plaintiff,

v.

Ridgedale Automotive, Inc.,et al.,

Defendants.

Civil No. 00-1478 ADM/AJBJB

REPORT AND RECOMMENDATION

This matter is before the Court, Magistrate Judge Arthur J. Boylan, for findings, conclusions, and recommendations regarding sanctions against plaintiff's counsel based upon failure to make certain disclosures. Hearing was held on October 1, 2001, at the U.S. Courthouse, 316 No. Robert St., St. Paul MN 55101. Alfred M. Stanbury, Esq., appeared on behalf of the plaintiff. Julianne E. Ortmann, Esq., appeared on behalf of the defendants. The matter is properly before the Magistrate Judge for report and recommendation under 28 U.S.C. §636 and Local Rule 72.1(c).

Based upon the file and documents contained

therein, along with affidavits, witness testimony, arguments of counsel, and the Court's previous Orders on discovery, the Court makes the following:

Findings and Conclusions

1. This Court issued an Order on Discovery dated March 14, 2001, therein requiring plaintiff to produce the 1997 Mustang automobile that is the subject of this action for inspection by a expert to be retained by the defendants. Plaintiff's appeal of the Order was dismissed in its entirety by the District Court by Order dated April 27, 2001. Plaintiff's expert examined the vehicle on March 21, 2001, for purposes of forming an opinion regarding the number of miles that the car has been driven that were not recorded on the odometer as a result of malfunction. The expert formed an opinion based upon his calculations on the amount of tire wear and brake pad wear. His opinion is not based upon examination or testing of the odometer itself andthe odometer was not removed or disassembled. The brake pads were the original equipment installed by the manufacturer. Three of the four tires which were measured for tread wear also appeared to be original equipment. The fourth tire was a newer replacement, likely put on the car in the course of repairs following a front-end accident which occurred when the car was in the possession of a previous lessee.

2. Plaintiff produced the vehicle for inspection by defendants' experts on September 20, 2001. The vehicle as produced had four new tires. Defendant's experts were able to evaluate brake pad wear, but were unable to obtain meaningful tire tread wear measurements because of the immediate unavailability of the original tires. An expert for defendants also observed that the steering column appeared to have been previously removed and reinstalled. Plaintiff

counsel had not disclosed the fact that new tires had been purchased and mounted on the car on July 10, 2001, subsequent to the expert's examination in March 2001. Hearing was held before the Court on September 10, 2001, at which time plaintiff continued to resist production of the vehicle for expert inspection. Neither the Court nor the opposing parties were advised at that time that the tires had been changed. Though the original] tires were not destroyed and remain available for inspection, plaintiff counsel's failure to timely produce the original tires for inspection along with the car constitutes an intentional effort to withhold evidence which is material to this acton and was subject to disclosure pursuant to court order and the obligation to supplement responses to defendants' discovery under Fed. R Civ. P. 26(e). Plaintiff is not faulted for replacing worn tires, but counsel's failure to promptly disclose such a material alteration and produce the original equipment for inspection is inexcusable.

3. The 1997 Mustang that is subject of the action was involved in a collision with a deer on August 14, 2001. As a result of the accident the car was damaged on the front driver's side. The damage was promptly repaired. This accident was not disclosed to defendants through discovery, and indeed, was not revealed until hearing in this matter on October 1, 2001. It does not appear ıhat the deer accident has any direct and critical implications with respect to the ability of defendants' experts to inspect the vehicle in regards to brake pad wear and tire tread wear. However, plaintiff was served discovery requests requiring disclosure of accidents and incidents of this nature and is required to supplement discovery responses as appropriate. Plaintiff counsel's failure to timely disclose the collision with a deer and the subsequent repairs to the Mustang

was a knowing and intentional effort to evade disclosure obligations.

4. Plaintiff counsel's failure to advise defendants that the tires on the 1997 Mustang had been replaced, failure to produce the original tires for inspection along with the vehicle, and failure to disclose the August 2001, collision with a deer, constitute intentional efforts to avoid required disclosure. Counsel's argument to the effect that defendants should have deduced the need for tire replacements, is unavailing and is essentially irrelevant to the discovery issue. Likewise with respect to the deer accident, materiality of the incident is separate from the disclosure obligation. Plaintiff counsel's conduct in this matter warrants significant sanction' which may be imposed by the Court in the exercise of its inherent power to control litigation. West v. Goodyear Tire & Rubber Co., 167 F.3d 776 (2d Cir. 1999).

5. Under the circumstances now presented to the Court, the sanction of dismissal of all claims would be unduly harsh where it has not been shown that certain discovery violations are materially adverse to the defense or will decisively prejudice defendant's case. Id. at 779. On the other hand, the Court finds that evidentiary sanctions, including striking all or portions of plaintiff's expert's report and opinion, would unnecessarily and unfairly impair the plaintiff's case as a consequence of counsel's misdeeds and would improperly de-emphasize the nature and significance of counsel's misconduct. Id. at 780. The Court therefore concludes that the appropriate sanction in the matter is plaintiff counsel's forfeiture of any statutory attorney fees which might have been claimed or assessed in the event plaintiff prevails in this action. Such sanction would not be intended to preclude any fees which might be due counsel pursuant to retainer agreement,

contract, or other binding arrangement between plaintiff and counsel.

Based upon the foregoing Findings and Conclusions, the Magistrate Judge makes the following:

RECOMMENDATION

It is hereby recommended that as sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure, plaintiff's counsel be precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute.

Dated: 10/2/01 s/Arthur J. Boylan

Arthur J. Boylan
United States Magistrate Judge

APPENDIX F: PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION FILED ON OCTOBER 2, 2001

***

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil Action, File Number 00-1478 (ADM/AJB)

Dawn Edlund,

Plaintiff,

v.

Ridgedale Automotive, Inc., a Minnesota corporation d/b/a Morrie's Minnetonka Ford f/k/a Bob Ryan Motors, Inc.; Bob Ryan Motors, Inc., a Minnesota corporation,

Defendants-Appellees.

PLAINTIFF'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION FILED OCTOBER 2, 2001

ORAL ARGUMENT REQUESTED

TO: HON. ANN MONTGOMERY, UNITED STATES DISTRICT COURT JUDGE, UNITED STATES DISTRICT COURT, U. S. COURTHOUSE - SUITE 13W, 300 SOUTH FOURTH STREET, MINNEAPOLIS, MN 55415.

Pursuant to Loc. R. 72.1(c)(2), plaintiff Dawn Edlund submits this objection to Magistrate Judge

Boylan's Report and Recommendation filed on October 2, 2001 A copy of the Report and Recommendation is attached as Exhibit 1 to Affidavit of Alfred Stanbury dated October 12, 2001. The district court judge shall make a *de novo* determination of those portions of a Report and Recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. Loc. R. 72.1(c)(2). The district court judge need not normally conduct a new hearing and may consider the record developed before the magistrate judge and make a determination on the basis of that record. *Id.* The district court judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions. *Id.*

OBJECTIONS

Plaintiff objects to following **bold** portions of the magistrate judge's findings, conclusions, and recommendation in the ways and for the reasons which thereafter follow:

¶ No. 1. This Court issued an Order on Discovery dated March 14, 20017 therein requiring plaintiff to produce the 1997 Mustang automobile that is the subject of this action for inspection by an expert to be retained by the defendants. **Plaintiff's appeal of the Order was dismissed in its entirety by the District Court by Order dated April 27, 2001.** Plaintiff's expert examined the vehicle on March 21, 2001, for purposes of forming an opinion regarding the number of miles that the car has been driven that were not recorded on the odometer as a result of malfunction. **The expert formed an opinion based upon his calculations of the amount of tire wear and brake pad wear.** His opinion is not based upon examination or testing of the

odometer itself and the odometer was not removed or disassembled. The brake pads were the original equipment installed by the manufacturer. Three of the four tires which were measured for tread wear also appeared to be original equipment. The fourth tire was a newer replacement, likely put on the car in the course of repairs following a front-end accident which occurred when the car was in the possession of a previous lessee.

¶ **No, 2.** Plaintiff produced the vehicle for inspection by defendants' experts on September 20, 2001. The vehicle as produced had four new tires. Defendant's experts were able to evaluate brake pad wear, but were unable to obtain meaningful tire tread wear measurements because of the immediate unavailability of the original tires. An expert for defendants also observed that the steering column appeared to have been previously removed and reinstalled. Plaintiff's counsel had not disclosed the fact that new tires had been purchased and mounted on the car on July 10, 2001, subsequent to the expert's examination in March 2001. Hearing was held before the Court on September 10, 2000, **at which time plaintiff continued to resist production of the vehicle for expert inspection.** Neither the Court nor the opposing party were advised at that time that the tires had been changed. Though the original tires were not destroyed and remain available for inspection, **plaintiff counsel's failure to timely produce the original tires for inspection along with the car constitutes an intentional effort to withhold evidence which is material to this action and was subject to disclosure pursuant to court order and the obligation to supplement responses to defendants' discovery under Fed. R. Civ. P. 26(e). Plaintiff is not faulted for replacing worn tires, but counsel's failure to promptly disclose such a material alteration and produce the**

original equipment for inspection is inexcusable.

¶ No. 3. The 1997 Mustang that is subject of the action was involved in a collision with a deer on August 14, 2001. As a result of the accident the car was damaged on the front driver's side. The damage was promptly repaired. This accident was not disclosed to defendants through discovery, and indeed, was not revealed until hearing in this matter on October 1, 2001 It does not appear that the deer accident has any direct and critical implications with respect to the ability of defendants' experts to inspect the vehicle in regards to brake pad wear and tire tread wear. **However, plaintiff was served discovery requests requiring disclosure of accidents and incidents of this nature and is required to supplement discovery responses as appropriate. Plaintiff counsel's failure to timely disclose the collision with a deer and the subsequent repairs to the Mustang was a knowing and intentional effort to evade disclosure obligations.**

¶ No. 4. Plaintiff counsel's failure to advise defendants that the tires on the 1997 Mustang had been replaced, failure to produce the original tires for inspection along with the vehicle, and failure to disclose the August 2001, collision with a deer, constitute intentional efforts to avoid required disclosure. Counsel's argument to the effect that defendants should have deduced the need for tire replacement is unavailing and is essentially irrelevant to the discovery issue. Likewise with respect to the deer accident, materiality of the incident is separate from the disclosure obligation. **Plaintiff counsel's conduct in this matter warrants significant sanctions** which nay be imposed by the Court in the exercise of its inherent power to control litigation. West v. Goodyear Tire & Rubber Company, 167 F.3d 776, 779 (2d Cir. 1999).

¶ No. 5. Under the circumstances now presented to the Court, the sanction of dismissal of all claims would be unduly harsh where it has not been shown that certain discovery violations are materially adverse to the defense or will decisively prejudice defendant's case. *Id.* at 779. On the other hand, the Court finds that evidentiary sanctions, including striking all or portions of plaintiff's expert's report and opinion, would unnecessarily and unfairly impair the plaintiff's case as a consequence of counsel's misdeeds and would improperly de-emphasize the nature and significance of counsel's misconduct. *Id.* at 780. **The Court therefore concludes that the appropriate sanction in this matter is plaintiff counsel's forfeiture of any statutory attorney fees which might have been claimed or assessed in the event plaintiff prevails in this action.** Such sanction would not be intended to preclude any fees which might be due counsel pursuant to retainer agreement, contract, or other binding arrangement between plaintiff and counsel.

Recommendation: It is hereby recommended that as sanction for knowing, intentional, and bad faith failure to comply with discovery obligations pursuant to Court order and Federal Rules of Civil Procedure, plaintiff's counsel be precluded from asserting any claim for attorney fees in this action which might otherwise be assessed or due pursuant to state or federal statute.

ARGUMENT

I. Plaintiff's Attorney Has In No Way Failed To Comply With Any Court Order.

Plaintiff's motion and appeal concerning the inspection did not amount to a refusal to permit an inspection or a refusal to comply with the magistrate judge's Order on Motions of March 14, 2001. To say or

argue otherwise, as defendants have done *ad nauseum*, ignores the fact that it is a party's right to appeal a magistrate judge's order, and failing to do so precludes review of the order on any subsequent appeal to a court of appeals. Compliance with a magistrate judge's order is tolled or stayed by an appeal of it, and, in the instant case, plaintiff's "refusal" to permit an inspection lasted for only about a month and then ceased on March 23d, the date her appeal of the March 14th Order was timely served and filed. On that appeal, she objected only to the portion of the Order which permitted defendants' experts to take the car into their custody and drive it. Plaintiff specifically stated on that appeal that she did not object to a visual inspection and the taking of photographs and measurements of the Mustang, and, in a letter of March 23d to the magistrate judge, plaintiff's attorney said "If nothing else, I think, it should be clear that this [appeal] cannot be accurately described as an appeal of 'the inspection' *per se*."

The magistrate judge's Order of March 14th was affirmed on April 27th, but plaintiff did not learn of the issuance of that decision until a month later on May 29th and did not see a copy of it until May 30th. When defendants' attorneys first learned of its issuance has never been volunteered, and the magistrate judge has never ventured to mention when he became aware of its issuance. The response of plaintiff's attorney was immediate. In a letter hand-delivered to Judge Montgomery on June 1st, he said in pertinent part:

> I did not learn of the issuance of Your Honor's Memorandum Opinion and Order of April 27, 2001, until the evening of May 29th. It was mentioned in defendants' Memorandum in Opposition to and Appeal from Magistrate Judge's Order on Motions Filed on May 1, 2001,

> which was mailed to me on May 24th but not received until May 29th. In the morning of May 30th, I phoned the court clerk and obtained a copy by fax. On May 24th, defendants also served a Notice of Rule 34 Notice of Inspection by mail, which I did not receive until May 29th. [Defendants' response to plaintiff's motion for partial summary judgment was also mailed on May 24th but received on May 26th]. That Notice of Inspection purports to schedule an inspection of my client's car on June 5th pursuant to the magistrate judge's Order on Motions of March 14, 2001, which Your Honor affirmed on April 27th.
>
> .
>
> .
>
> .
>
> Additionally, I am going to move for a protective order concerning the inspection of the car, but I have not yet figured out whether that motion should be appropriately brought before the magistrate judge or coupled with a request of Your Honor for leave to file a motion for reconsideration of the Memorandum and Opinion Order of April 27th. . . . .

Consistent with what plaintiff's attorney understands to be the court's well-settled preference for the consolidation of motions when possible, plaintiff's motion for a protective order pursuant to Fed. R. Civ. P. 26(c) was filed three days later on June 4th for hearing 14 days hence on June 18th, the date on which the

cross-motions had already been scheduled to be heard by Judge Montgomery. Hearing of plaintiff's motion for a protective order, which in effect was a motion for an order of indemnification, was postponed pending a decision as to the cross-motions for summary judgment, and it was not until about August 13th that it was referred to the magistrate judge for hearing on what turned out to be September 10th. From June 4th to September 10th, *i.e.*, from the date on which plaintiff's motion for a protective order was filed to the date on which the motion was decided from the bench by the magistrate judge, plaintiff was not "failing to comply" with the magistrate judge's original inspection order. *See* Fed. R. Civ. P. 37(d) ("The failure to act described in this subdivision may not be excused on the ground that the discovery is objectionable ***unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).***"). (Emphasis added).

One needs only to read or have read plaintiff's papers in support of her motion for a protective order to understand that plaintiff did not "continue[] to resist production of the vehicle for expert inspection" at the hearing on September 10th. By way of her motion for a protective order, plaintiff sought an order which would protect her from what could happen to her and her property when defendants took the car into their custody. *See* Exhibit 2 to Stanbury Affidavit. Plaintiff had an unquestionable right to seek an order protecting her from a potentially ruinous financial calamity, and seeking to do so at the hearing on September 10th can hardly be described as "continuing to resist production of the vehicle for expert inspection"

II. Plaintiff's Attorney Has In No Way Failed To Comply With Discovery Or Disclosure Obligations.

At the deposition of Ms. Edlund on March 28,

2001, when defendants' attorney learned that Ms. Edlund had driven to the deposition in a rental car that was personally costing Ms. Edlund $21.99 per day since her insurance policy provided no such coverage, the following exchange took place:

J. Ortman:	**Why aren't you driving the Mustang?**
Edlund:	The tires are not suitable for road driving.
J. Ortman:	**Couldn't you replace the tires?**
Edlund:	I am sure I could.
J. Ortman:	**Why don't you?**
Edlund:	**I think it is important that the tires remain on the car while this litigation is in process.**
J. Ortman:	Have you sought out an estimate on the cost of replacing the tires?
Edlund:	Yes, I have.
J. Ortman:	Where was that from?
Edlund:	Well, actually two places, Firestone and I did go to Tires Plus, but I didn't receive--you know, he told me how much ballpark it would be, but it wasn't an estimate.
J. Ortman:	What did Firestone say?
Edlund:	They told me for the original tires on that car to be replaced would be, I think it was anywhere from five to $700.
J. Ortman:	**Wouldn't that be cheaper**

than renting a car daily?

Edlund: I don't know that it would be. I'm looking at a very short term rental, so I don't know that it is.

Exhibit 3 to Stanbury Affidavit, (pp. 65:24 - 66:24) (emphasis added).

"Why aren't you driving the Mustang?," "Couldn't you replace the tires?," "Why don't you?." and "Wouldn't that be cheaper than renting a car daily?" are not the words and questions of someone who was in the least bit concerned about the change in condition that would occur if Ms. Edlund had replaced or were to replace the bald tires.

Rule 26(e), cited by the magistrate judge, provides:

> A party who ***has made*** a disclosure under subdivision (a) ***or responded to*** a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
>
> (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty

> extends to both to ***information contained in the report*** and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.
>
> (2) A party is under a duty seasonably to amend ***a prior response*** to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process.

(Emphasis added.)

After appropriately acknowledging that the Mustang's recent collision with a deer did not affect defendants' ability to inspect the car's brake pad and tire tread wear, the magistrate judge mistakenly states that "plaintiff was served with discovery requests requiring disclosure of accidents and incidents [like the collision with a deer on August 14, 2001]." Defendants **never** served any such discovery request, as shown by the compendium of **every one** of defendants' document requests, interrogatories, and requests for admissions which were served during the litigation of this case. *See* Exhibit 4 to Stanbury Affidavit. Plaintiff's attorney, as a result, had no obligation to disclose the immaterial and irrelevant collision with a deer and the subsequent, albeit expensive, repairs. There is no obligation to supplement a discovery response that one has never mad and was never required to make. Consequently, the magistrate judge had no good reason

to conclude that plaintiff's attorney knowingly and intentionally evaded his discovery obligations.

The installation of new tires was immaterial and irrelevant to the case generally and to defendants' analysis of the odometer specifically. It did not change any of the information or opinions contained in Mr. Brand's report, and thus plaintiff's attorney was under no duty to disclose it pursuant to Rule 26(e)(1). While the parties were working out the indemnification agreement at the hearing before the magistrate judge on September 10th, plaintiff proposed making the car available for inspection at her place of employment. Affidavit of Dawn Edlund dated October 12, 2001, ¶ 24. Where plaintiff had repeatedly argued, seemingly in the wilderness, that the car could not and should not be driven on its bald tires, learning that plaintiff was driving the car to work could only have been taken to mean that the bald tires were no longer on the car.

Nevertheless, defendants proceeded to serve another Notice of Rule 34 Inspection which, as before, did not express any intention or desire to inspect the bald tires. In that Notice, defendants said in pertinent part:

> Among other things, Defendants intend to remove the tires on the vehicle in order to evaluate the brakes, in response to the opinion offered by Mr. Paul Brand. The tires will be replaced with appropriate care before the vehicle is returned.

Plaintiff's attorney was present in close proximity to and throughout the two-hour inspection that was conducted in and outside of D&D Speedometer in Roseville and was not asked at any time about the bald tires or their whereabouts. Plaintiff's attorney was not asked about the bald tires or their whereabouts in the week that elapsed after the inspection was conducted.

If plaintiff's attorney had been asked at any time about the bald tires and their whereabouts, he would have told them that they were in plastic bags in his client's garage and available for inspection. Edlund Affidavit, ¶ 20.

During the telephonic appeal of a portion of Magistrate Judge Boylan's Order of September 12th, defendants' attorney said nothing about the tires. The hearing focused solely on an examination of the brakes and Magistrate Judge Boylan's decision to allow defendants to dismantle "the car." When counsel worked up the jointly agreed upon jury instructions on September 19th, plaintiff's attorney was not asked about the bald tires.

At the hearing before the magistrate judge on September 10th, an intention to pick up the car on a flatbed was expressed. That idea appeared to have been abandoned after defendants' attorney learned that Ms. Edlund was driving the car, because, on September 20th, when plaintiff, her attorney, and defendants' attorney were waiting in the Medtronic parking lot for the car to be picked up, plaintiff's attorney mentioned something like it might be difficult for a flatbed to negotiate the parking lot, and defendants' attorney, Raymond Ortman, said they were not bringing a flatbed and said nothing about the fact that the bald tires did not appear to be on the car. Edlund Affidavit, ¶ 25. One of defendants' experts, Tom Gardas, subsequently arrived in a regular vehicle and, before driving the Mustang to D&D Speedometer, he said nothing about the fact that the bald tires did not appear to be on the car. *Id.*

At the hearing before the magistrate judge on October 1st, plaintiff's tire expert, Paul Brand, showed that the circumference of the new tires was only about 1% larger than the circumference of the bald tires and

thus would have no more than a negligible effect on the accuracy of the odometer. Moreover, Mr. Brand pointed out that, even though brake pad measurements were included in his report, his actual miles opinions were based on tread wear and *not* on brake pad wear, and the magistrate judge acknowledges in the Report and Recommendation that the new tires did not affect defendants' ability to measure brake pad wear.

III. A Forfeiture Of Statutory Attorney's Fees Cannot Be Justified Under The Circumstances And Probably Under Any Circumstances.

The entitlement of a prevailing plaintiff's attorney to statutory attorney's fees in a case of this sort is provided n 49 U.S.C. § 32710(b)(2):

> Any person who, with the intent to defraud, violates any requirement imposed under § 32705 shall be liable, in an amount equal to the sum of (1) three times the amount of actual damages sustained or $1,500, whichever is greater, and (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fees as determined by the court.

The reason Congress provided for statutory attorney's fees in odometer cases was explained in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 726-27 (8th Cir. 1978) (emphasis added), wherein the Eighth Circuit held in pertinent part:

> To accomplish its remedial purposes the Act provides in 15 U.S.C. § 1989 for the recovery of treble damages or $1500, whichever is greater. ***The same section makes recovery of reasonable attorney's fees a mandatory feature of a defendant's***

> ***liability upon proof of a violation. We agree with the district court's observation that these provisions are a response to legislative recognition that, as a practical matter, 'in many situations, the amount of damages under the Act will be so small that few attorneys will pursue his client's case with diligence unless the amount of the fee be proportionate to the actual work required, rather than the amount involved.'*** In rejecting defendants argument, we do not minimize the significance of the amount of recovery as a factor in determining the reasonable value of an attorney's services. That factor, however, must be placed alongside the others, and all must be placed in the context of a concrete case. We hold that where as here, a remedial statute requires the awarding of attorney fees as an element of recovery, a showing that the trial court's award exceeds the amount of damages does not, standing alone, amount to an abuse of discretion.

A capricious abrogation of that right, which is what the magistrate judge has recommended in this case, cannot be justified. Rule 37(c)(1) authorizes "other appropriate sanctions" but not if the failure is harmless, as it was in this case. The failure of plaintiff's attorney to expressly disclose the replacement of the tires and the collision with a deer in the absence of any duty to do so was harmless and not in any way intentional, willful, or done in bad faith.

CONCLUSION

For the foregoing reasons, plaintiff moves the

court for an Order rejecting the magistrate judge's Report and Recommendation filed on October 2, 2001.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: 10/12/01

s/Alfred Stanbury

ALFRED STANBURY
A.I.N. 190457
2209 St. Anthony Parkway
Minneapolis, MN 55418
(612) 789-5060
ATTORNEY FOR PLAINTIFF

APPENDIX G: REPLY TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE BOYLAN FILED ON OCTOBER 2, 2001

***

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil Action, File Number 00-1478 (ADM/AJB)

Dawn Edlund,

Plaintiff,

v.

Ridgedale Automotive, Inc., a Minnesota corporation d/b/a Morrie's Minnetonka Ford f/k/a Bob Ryan Motors, Inc.; Bob Ryan Motors, Inc., a Minnesota corporation,

Defendants-Appellees.

REPLY TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THE REPORT AND RECOMMENDATION FILED ON OCTOBER 2, 2001

ORAL ARGUMENT REQUESTED

TO: HON. ANN MONTGOMERY, UNITED STATES DISTRICT COURT JUDGE, UNITED STATES DISTRICT COURT, U. S. COURTHOUSE - SUITE 13W, 300 SOUTH FOURTH STREET, MINNEAPOLIS, MN 55415.

Pursuant to Loc. R. 72.1(c)(2),[1] plaintiff Dawn

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1 The district court judge shall make a *de novo* determination of those portions of a Report and Recommendation to which objection is made and may

Edlund submits this reply to defendants' memorandum in support of Magistrate Judge Boylan's Report and Recommendation filed on October 2, 2001.

REPLY

I. Under The Circumstances, The Delayed Production Of The Original Tires And The Delayed Disclosures Of The Tire Replacement And The Collision With A Deer Do Not Support A Sanction Of Any Sort, Let Alone A Sanction As Harsh As A Forfeiture Of Statutory Attorney's Fees.

The magistrate judge based his recommended forfeiture of statutory attorney's fees on his findings that the failure to ***timely*** produce the original tires for inspection was an intentional effort to withhold evidence which was material to this case and that the failure of plaintiff's attorney to ***timely*** disclose the replacement of the tires and the collision with a deer and subsequent repairs were knowing and intentional efforts to evade disclosure obligations. Exhibit 1 to previously filed Affidavit of Alfred Stanbury dated October 12, 2001 (Report and Recommendation, p. 3). (Emphasis added.)

At trial, the court declined to give defendants' proposed spoliation jury instruction, which would have told the jury that "[i]f you find that plaintiff ***intentionally attempted*** to conceal or withhold from defendants material evidence as to the condition of her vehicle, then you may infer that such evidence, had it not been concealed or withheld, would tend to disprove plaintiff's claims in this case." (Emphasis added.)

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accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. Loc. R. 72.1(c)(2). The district court judge need not normally conduct a new hearing and may consider the record developed before the magistrate judge and make a determination on the basis of that record. *Id.* The district court judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions. *Id.*

Having declined to give that instruction, the court cannot reasonably adopt or affirm the magistrate's conclusion that plaintiff's attorney knowingly and intentionally withheld evidence which was material to the action and knowingly and intentionally evaded disclosure obligations.

The replacement of the tires and the collision with a deer did not materially change the "condition" of the Mustang nor prejudice defendants' case. The court excluded references at trial to the collision with a deer and would not have done that if the court believed that the collision was relevant. Before he was able to inspect the original tires, defendants' expert Miller stated in his report that "it is my opinion that there is no possible way to determine with any degree of accuracy the current mileage on the vehicle or at the time Ms. Edlund purchased the car based only upon the tires and brakes." Exhibit 1 to Affidavit of Alfred Stanbury dated October 30, 2001[2] (Miller Report, p. 1). While defendants now contend in conclusory fashion that their case was prejudiced by this, that, or whatever, defendants' attorney, when asked by the magistrate judge on October 1st, could not explain how the replacement of the tires prejudiced defendants' case, and the magistrate judge concluded that "it does not appear that the deer accident has any direct and critical implications with respect to the ability of defendants' experts to inspect the vehicle in regards to brake pad wear and tire tread wear" and "it has not been shown that certain discovery violations are materially adverse to the defense or will decisively prejudice defendants' case." Exhibit 1 to previously filed Affidavit of Alfred Stanbury dated October 12, 2001 (Report and Recommendation, pp. 3 and 4).

Consequently, a forfeiture of statutory attorney's fees in the instant case can only be justified--if at all--by

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2 Hereinafter "Stanbury Affidavit".

the delayed disclosures concerning the tire replacement and the collision with a deer. In the absence of any showing that defendants' case was prejudiced, those delays of eight and six weeks, respectively, cannot support the imposition of a sanction of any sort,[3] let alone a sanction as harsh as that which the magistrate judge has recommended.

II. Even Though They Are Irrelevant To The Issue At Bar, Defendants' Factual Misstatements Require A Reply.

Defendants' memorandum contains nothing which supports or even aims to support the magistrate judge's recommended forfeiture of statutory attorney's fees, and defendants have not confronted plaintiff's objections to specified portions of the magistrate judge's findings, conclusions, and recommendations. Defendants' memorandum, however, does contain numerous factual misstatements which require a reply regardless of their irrelevancy to the issue at bar, *to wit:*

- *"On one day alone, . . . Attorney Stanbury filed four untimely motions: . . . ."*

A motion for a continuance is not controlled by a

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3 On October 2, 2000, defendants served their Rule 26(a)(1) Initial Disclosures in which they disclosed only five persons with knowledge of the disputed facts alleged in the pleadings, one of whom was plaintiff herself and one of whom was CT Corporation System, Inc. (Ford Motor Company's registered agent for service of process). Defendants concluded the list with the following: "Other service department personnel now or previously employed at Bob Ryan Ford now Morrie's Minnetonka Ford (names to be developed during discovery)." Nothing was said as to what sort of knowledge each of the five, human or otherwise, possessed. *See* Exhibit 3 to Stanbury Affidavit. Some ***seven months*** into the litigation and only after being ordered to do so by the magistrate judge acting on plaintiff's motion to compel, defendants served their Additional Rule 26(a)(1) Disclosures in which they listed an additional 13 individuals who were likely to have knowledge of the particular facts of the case. *See* Exhibit 4 to Stanbury Affidavit. No sanction was imposed for that seven-month delay.

motion deadline, and plaintiff's motion for a continuance was in effect granted; her motion for Rule 11 sanctions was heard and denied, and the appeal of that denial is pending; her motion for an indemnifying protective order was not untimely and was denied as moot only after the indemnification agreement which plaintiff sought was executed; and her motion to strike was not untimely but there was no reason to pursue it after the court denied defendants' motion for summary judgment.

- *"[T]he evidence at trial showed the diminished value of this car with stated versus actual miles was in the range of a few hundred dollars to $6,300.00 (the amount requested by plaintiff at trial)."*

Plaintiff's request at trial was not limited to $6,300, but, even if it had been, closing argument is not evidence and does not dictate the upper limit of a jury's award, *e.g:*

Judge:	Have you reached a verdict?
Foreman	We have Your Honor. Your Honor, we've agreed to hold for the plaintiff, Debra Ann Kay, and against [the Diocese], Doctors Towler and Marks. But Your Honor, are we limited on the size of the award? What I mean, sir, are we permitted to award an amount greater than the amount plaintiff asked for?
Judge:	You are. You're not bound by anything other than your good judgment based on the evidence. Please retire and when you've agreed on the amount of the award . . . . [fade out]

From *The Verdict* starring Paul Newman,

Twentieth Century Fox 1982.

- *"Attorney Stanbury received [plaintiff's experts'] reports on March 23, 2001, and March 30, 2001."*

Brand's report was dated March 23, 2001, but not received until March 28th; Peterson's report was dated March 30, 2001, but not received until after plaintiff's responses to defendants' interrogatories and document requests had been served on April 2, 2001. *See* Memorandum of Law in Opposition to Defendants' Motion *In Limine*, p. 3.

- *"Plaintiff's Rule 26(a)(1) Disclosures dated October 13, 2000, included a Calculation of Damages, in the amount of $71,733-83,733."*

True but *after* trebling $23,911-27,911. Not mentioned by defendants is the fact that the amount by which the value of the automobile with fraudulent mileage exceeded its true value was estimated to be $13,000-17,000, compared to the eventual jury award of $13,000.

- *"Attorney Stanbury willfully failed to disclose these Reports from his (sic) Experts even though they had been ordered to be produced in the Pretrial Scheduling Order of September 6, 2000, were required to be produced under Rule 26(a)(2), or were required to be supplemented under Rule 26(e)."*

At the hearing of plaintiff's motion for an indemnifying protective order before the magistrate judge on September 10, 2001, defendants' attorney asserted that defendants' case was prejudiced by plaintiff's failure to produce her experts' reports until late May 2001.[4] However, when the seemingly perplexed magistrate judge asked defendants' attorney why defendants had not deposed plaintiff's experts in June, July, August, or September, defendants' attorney

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4 The reports of plaintiff's experts, Paul Brand and Webster Peterson, were attached as Exhibits 1 and 4, respectively, to the Affidavit of Alfred Stanbury filed on May 30, 2001--not, as defendants now say, "in June, 2001."

was at a loss to answer. Just as telling has been defendants' inability or unwillingness to explain why they refused to visually inspect, measure, and photograph the car during March, April, May, June, July, August, or most of September while plaintiff's challenges to the driving of the car and then her motion for an indemnifying protective order were pending. *See, e.g.,* Memorandum of Law in Opposition to Defendants' Motion *In Limine,* pp. 4-5.

- *"As the Court is well aware, Defendants were denied any opportunity to inspect the car until September 20, 2001."*

From March 23, 2001, to September 20, 2001, defendants were prevented only from driving the car; they could have visually inspected, photographed, and measured the car at any time during that period. *See* Exhibit 1 to Stanbury Affidavit (Plaintiff's Objections To Inspection Reports Of Dean Miller And Tom Gardas, pp. 4-5).

- *"Plaintiff did not submit Affidavits at the hearing (on October 1, 2001), and the only testimony presented by Plaintiff was that of Paul Brand."*

At the hearing on October 1, 2001, plaintiff submitted Plaintiff's Objections to Inspection Reports of Dean Miller and Tom Gardas and an Affidavit of Alfred Stanbury dated October 1, 2001 *See* Exhibit 1 to Stanbury Affidavit. While plaintiff "only" presented the testimony of Brand, defendants presented no testimony at all, and, moreover, plaintiff herself was present and prepared to testify if it appeared necessary, which it did not.

- *"In their Request [No. 1] for Production of Documents, Set II, Defendants specifically asked for 'each and every document which relates to any repairs being performed on the Vehicle at any time.'"*

The complete wording of that Request No. 1 was "Each and every document referred to in Paragraph No. 10 of Plaintiff's First Amended Complaint, which

includes the entry by Bob Ryan Motors that states, "Bad Odometer-not fixed," and each and every document which relates to any repairs being performed on the Vehicle at any time." Plaintiff took that to refer to repairs that had already been performed, as indicated by her answer and, particularly, by her objection, which were:

> **OBJECTION:** Plaintiff objects to Request No. 1 to the extent that it seeks documents that are more easily and logically sought from another source, namely defendants.
> **RESPONSE:** Notwithstanding the foregoing objection and without waiving it, plaintiff has no responsive documents beyond those which she has already produced. The phrase "bad odometer-not fixed" is a summary of the explicit and implicit entries on the service records dated October 22, 1997.

- *"Defendants were forced, essentially, to concede at trial that the odometer was broken, because they were unable to obtain Court authority for removing, testing, and calibrating the odometer."*

In his Order on Motions filed on March 14, 2001, the magistrate judge ruled that there would be no dismantling of the Mustang, including its odometer. Defendants did not appeal that order. At the hearing before the magistrate judge on September 10, 2001, defendants again sought permission to remove, test, and calibrate the odometer, and the magistrate judge denied the request. Defendants' experts themselves conceded at trial that calibrating an intermittently malfunctioning odometer would not be productive anyway.

- *"Defendants were prejudiced by not learning of these individuals (who repaired the Mustang in August 2001) until two days before trial."*

The exclusion of references at trial to the collision with a deer would have precluded testimony by those individuals, just as Thomas Mahaney of the AG's Office was precludedfrom testifying. At the same time, however, defendants' attorney was asked to update the address of Bill Berg but ignored that request. *See* Exhibit 2 to Stanbury Affidavit. To gain an appreciation of the potential significance of Berg as a witness, *see* Memorandum of Law in Support of Plaintiff's Objections to and Appeal of Magistrate Judge's Order on Motions for Protective Order and Sanctions Filed on September 12, 2001, p. 9.

III. Defendants' Argument IV Is Particularly Inane.

Whether or when plaintiff disclosed Paul Brand's compensation is immaterial to the issue at bar. The magistrate judge's recommended forfeiture of statutory attorney's fees was not based on a failure to disclose that compensation. At the hearing before the magistrate judge on October 1, 2001, defendants' attorney could have asked Brand about his compensation but did not. Brand's compensation had been inadvertently omitted from what was by any measure a more than sufficient disclosure of his background, experience, opinions, and the grounds for his opinions.

At trial, plaintiff's attorney did not tell defendants' attorney that "he had no documents by which he could disclose [Brand's] compensation" and thus did not "lie" about that or anything else.[5] While cross examining Brand, defendants' attorney was shown a TASA contract from which the average attorney could have deduced that plaintiff was required to pay $230 to TASA for each hour of Brand's time. Brand truthfully testified that his hourly rate was $150. TASA retains the difference.

IV. There Does Not Appear To Be Any Case

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5 Conversely, defendants' attorneys have filed fales affidavit testimony on at least three occasions. *See* Exhibit 5.

Authority Which Supports An Ordered Forfeiture Of Statutory Attorney's Fees.

The magistrate judge cited *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999), for the proposition that significant sanctions can be imposed by the court in the exercise of its inherent power to control litigation. The court's power to impose "significant" sanctions is not disputed but does not by itself validate an ordered forfeiture of statutory attorney's fees. *West* was a spoliation case which did not involve the ordered forfeiture of statutory attorney's fees. The instant case was not a spoliation case, and the defendants' case was not shown to have been prejudiced by the delayed disclosures.

As recognized by the Eighth Circuit Court of Appeals in *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 726-27 (8th Cir. 1978), Congress provided for statutory attorney's fees in the Federal Odometer Law because, as a practical matter, "in many situations, the amount of damages under the Act will be so small that few attorneys will pursue his client's case with diligence unless the amount of the fee be proportionate to the actual work required, rather than the amount involved." The apparent absence of reported cases involving a forfeiture of statutory attorney's fees is understandable. The remedial purposes of the Federal Odometer Law would be eviscerated if practitioners who would be otherwise inclined to take on such cases were to learn that their right to statutory attorney's fees might be forfeited for the slightest discovery or disclosure violation.

CONCLUSION

For the foregoing and previously stated reasons, plaintiff moves the court for an Order rejecting the magistrate judge's Report and Recommendation filed on October 2, 2001.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: 10/30/01

s/Alfred Stanbury

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